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IN THE

Supreme Court of the United States

OCTOBER TERM 1980

COMPANIA MARITIME NAVEGACION NETUMAR, S.A.,

Petitioner,

against

SAM IRIZARRY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. What standard of care may properly be derived from the existing conflict of the Circuit Courts of Appeals to measure the duty owed by a shipowner to a longshoreman under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act?

2. May a shipowner properly be held liable to a longshoreman injured on the pier by a slippery condition caused by the climate, existing on a cargo container that was discharged from the vessel and landed on the pier, while under the active control of the stevedore-employer who determined the methods of operation, supervised the details of the work, and was obliged by Federal Safety Regulations to correct any unsafe slippery condition in the area over which it assumed control?

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No._____

COMPANIA MARITIME NAVEGACION NETUMAR, S.A.,

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against

SAM IRIZARRY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on April 22, 1980.

Citations to Opinions Below

The opinion of the District Court, printed in Appendix A hereto, *infra*, pp. 1a-3a is not yet reported. The informal opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, pp. 4a-6a, is not reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on April 22, 1980. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

Statute and Regulation Involved

Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, 33 U.S.C. §905(b):

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

29 C.F.R. Part 1918, Safety and Health Regulations for Longshoring, §1918.91(c):

> Slippery conditions shall be eliminated as they occur.

Statement of the Case

Plaintiff-Respondent brought this personal injury action under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) as amended in 1972 (33 U.S.C. 901 *et seq.*), claiming that the negligence of the defendant-petitioner shipowner caused the accident which resulted in his injuries.

The action was commenced in the United States District Court for the Southern District of New York on or about January 31, 1979 and jurisdiction was based on Title 28 U.S.C. 1332. A jury trial resulted in a verdict for the plaintiff. The Second Circuit Court of Appeals affirmed the District Court and this petition followed.

Statement of Facts

The plaintiff, a longshoreman, sustained injuries on February 1, 1977, when he allegedly slipped and fell from the top of a cargo container after it had been removed from the defendant's vessel by a floating derrick and had been landed on the dock which was under the exclusive control of plaintiff's stevedore employer.

The plaintiff was a regular employee of Sealand Terminals, an independent stevedore contractor, which had contracted with petitioner to discharge containers from petitioner's vessel, the *M/V Diana,* at Pier 36 East River, New York. From 8:00 a.m. until the plaintiff's accident at 7:45 p.m., the plaintiff and other employees discharged containers which had accumulation of ice and/or snow of varying degrees on them. Some snow had fallen earlier in the day and it was cold. It was not unusual to have accumulations of ice and snow for this time of the year and the condition was open and obvious. There was no evidence that the petitioner's conduct in any way caused or contributed to the accumulation of the ice and snow or that the allegedly dangerous condition could not be avoided by the exercise of ordinary care.

The discharge operation on petitioner's vessel and on the dock was conducted under the active and exclusive control of the stevedore employer and under the direct supervision of a hatch boss and a foreman both of whom were employed by an expert and experienced stevedore contractor. Although the accepted procedure for complaints about working conditions by the longshoremen was for the longshoremen to lodge their complaint either with their hatch boss or the foreman and they in turn would

relay the complaint to the shipowner, no complaints were made by any of the longshoremen to either of the supervisors or by either of the supervisors to the shipowner about the presence of ice and/or snow on the containers.

At or about 7:45 p.m. when the last container from one of the vessel's hatches had been landed on the pier, the plaintiff and three other longshoremen were raised by a hi-lo in a safety box to the top of the container. The plaintiff's accident occurred after he had stepped from the safety box onto the top of the container and was walking toward one of the corners of the container in order to release a hook by means of which the container was attached to the lifting gear.

There was no evidence that the working conditions were unusual for that time of the year or that the stevedore contractor was incompetent or that the stevedore could not have conducted the discharge operation in safety with the exercise of ordinary care.

The trial court ruled that a rhetorical expression of irritation by one of the plaintiff's co-workers about the seasonal weather effects on the containers to an individual identified by the co-worker as the vessel's first mate and that a mere shrug of the shoulders by the so-called mate was sufficient to shift the responsibility for the conduct of the discharging operation from the stevedore to the shipowner.

At the trial, petitioner requested that the trial judge charge the jury that the shipowner's obligation to provide a safe place to work is not absolute and that when a shipowner has employed a stevedore to discharge its vessel, it has the right to assume that the stevedore will perform its service with reasonable safety. The trial judge refused this charge and a verdict for the plaintiff in the amount of $45,000.00, reduced by 10% comparative negligence, was returned. The defendant's motion for judgment *non obstante verdicto* was denied. (Appendix A) The Court of Appeals for the Scond Circuit affirmed with the informal opinion attached hereto in Appendix B.

Reasons for Granting the Writ

The Court should issue this Writ of Certiorari to resolve a conflict apparent on the face of the recent decisions of the Circuit Courts of Appeals which have endeavored to formulate a standard of care by which a shipowner's duty to a longshoreman under the Longshoremen's and Harbor Workers' Compensation Act may properly be measured.[1] The issue of which standard of care would best implement the Congressional intent of developing uniform federal law in this area[2] is an important issue which has not been, but should be decided by this Court.

This petition will therefore present the conflict presently existing in the Courts of Appeals, examine the Congressional intent of establishing a uniform Federal Law concerning this issue and, lastly, present the dual error of the Court of Appeals in first applying the Second Circuit standard of care to this case, and, second, in not reversing the District Court and entering judgment *non obstante verdicto* as a matter of law under the facts and circumstances of the case *sub judice*.

POINT I

The conflicting decisions of the Courts of Appeals for the First, Second, Third, Fourth, Fifth and Ninth circuits must be resolved by this Court.

The conflicting decisions of the Circuit Courts of Appeals have prevented the effectuation of the Congressional intent in amending the LHWCA in 1972. The conflict has arisen from the failure of Congress to specifically define the standard of

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[1] *Mattivi* v. *South African Marine Corp.*, 618 F. 2d 163 (2d Cir. 1980), *Giglio* v. *Farrell Lines, Inc.*, 613 F. 2d 429 (2d Cir. 1978); *Hurst* v. *Triad Shipping*, 554 F. 2d 1237 (3rd Cir. 1977); *Rich* v. *United States Lines, Inc.*, 596 F. 2d 541 (3rd Cir. 1978); *Riddle* v. *Exxon Transportation Co.*, 563 F. 2d 1103 (4th Cir. 1977); *Chavis* v. *Finnlines, Ltd. O/Y*, 576 F. 2d 1072 (4th Cir. 1978); *Santos* v. *Scindia Steam Navigation Co.*, 598 F. 2d 480 (9th Cir. 1979); *cert. granted* ____U.S.____ (1980); *Bachtel* v. *Mammouth Bulk Carriers*, 605 F. 2d 438 (9th Cir. 1979) (Petition for Certiorari filed October 1, 1979).

[2] The intent of Congress is discussed in Point II, *infra*.

care by which a court may measure a shipowner's "negligence" as that term is used to define the liability of a shipowner to an injured longshoreman. The conflicting decisions are analyzed below.

A) The First Circuit

The appropriate standard of care applicable in a longshoreman's action against a vessel for personal injuries in the First Circuit is distinguished on the basis of the situs of the injury. *Anderson* v. *Iceland S.S. Co.*, 585 F. 2d 1142 (1st Cir. 1978) provides the law in cases where the injury has occurred on the pier. While not adopting Section 414A of the Restatement of Torts (Second) as the general rule to be applied in these cases, the Court clearly rejects the application of §343 and §343A of the Restatement holding:

> "We find [Sections 343 and 343A] inapplicable in a case . . . where the injury occurs elsewhere than the vessel."
>
> *Anderson, supra,* at 1149

More specifically, in determining who should properly bear the responsibility and liability for the condition of the cargo the Court stated:

> "The stevedore is hired for its expertise in handling cargo, including cargo which arrives from its journey in less than optimal condition."
>
> *Anderson, supra,* at 1151

This decision is in direct conflict with the Second Circuit's decision to apply §343A to the instant case where the condition of the cargo was caused by the vagaries of the weather, and the accident occurred on the pier. This conflict extends to a plurality of the circuits, who have either explicitly or implicitly adopted Sections 343 and 343A of the Restatement.[3]

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[3] *See* discussion concerning the Second, Third, Fourth, Fifth and Ninth Circuits, *infra.*

The recent decision of the First Circuit in *Johnson* v. *A/S Ivarana Rederi*, 613 F. 2d 334 (1st Cir. 1980) enunciates the law to be applied in cases where the injury has occurred on the vessel. In its decision, the Court held that §§343 and 343A and all of the Restatements (Second) of Torts may be utilized in developing the standard of case under §905(b) "only when purged of concepts antithetical to the recognized purpose of §905(b)." *Johnson, supra* at 347. The standard of care that this case provides is that §905(b) imposes on the shipowner the same duty to exercise "reasonable care under the circumstances of each case" that would be applicable to a land based business, *Johnson, supra*, p. 346. In rejecting §343A the First Circuit relied heavily on the Ninth Circuit decision in *Santos* v. *Scindia Steam Navigation Co., Ltd.*, 598 F. 2d 480 (9th Cir.) *cert. granted*, _____ U.S. _____, 100 S. Ct. 77, _____ L. E. 2d _____ (1980). As indicated *infra*,[4] however, the *Santos* case will soon be under the scrutiny of this Court and the First Circuit's adoption thereof is pertinent to this petition only to the extent the First Circuit is in direct conflict with the Second Circuit's application of Section 343A to the case *sub judice*.

B) The Second Circuit

In the Second Circuit two principles of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* are well settled. As Congress intended[5] a shipowner shall be liable only where its negligence proximity caused the plaintiffs injury, *Giglio v. Farrell Lines, Inc.*, F. 2d (2d Cir. 1980) and this liability would be determined in accordance with land-based principles of negligence, *Napoli* v. *Hellenic Lines, Ltd.*, 536 F. 2d 505 (2d Cir. 1976). In *Napoli, supra*, the Second Circuit adopted §343A of the Restatement of Torts (Second) which provides as follows:

> "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on

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[4] *See* note 18 and accompanying text, *infra*.
[5] *See* Point II *infra*.

> the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness" Restatement (Second) of Torts §343A(1) (1965).[6]

Thus, the standard of care applied in the Second Circuit is §343A of the Restatement (Second) of Torts which imposes liability on the shipowner for injuries arising from dangerous conditions on the vessel of which the shipowner is aware, *Ruffino* v. *Scindia Steam Navigation Co.*, 559 F. 2d 861 (2d Cir-1977) but only where the shipowner should anticipate the longshoreman could not avoid the danger, *Mattivi* v. *South African Marine Corp.*, 618 F. 2d 163 (2d Cir. 1980).

Although decisions concerning an application of this standard of care to situations where both the stevedore contractor and the shipowner are aware of an allegedly dangerous condition have been inconsistent,[7] it is clear that the Second Circuit adopted §343A as the standard of care applicable to a shore side injury in the case *sub judice*. This application is in direct conflict to the First Circuit *Anderson*[8] decision which held specifically that §343A was inapplicable to accidents which occur elsewhere than the vessel.[9]

Besides being in direct conflict with the First Circuit, however, the decision in this case is in conflict with those decisions of the Third, Fourth, Fifth and Ninth Circuits which have developed a standard of care by which to measure the duty owed by a shipowner to a longshoreman.

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[6]The application of this Section to an injury which occurred on the pier rather than the vessel is discussed in Point III, *infra*.

[7]*Compare Cox* v. *Flota Merchante Grancolombiana, S.A.*, 577 F. 2d 798 (2d Cir.) *cert. denied* 439 U.S. 881 (1978), *with Lopez* v. *A/S D/S Svendborg Line*, 581 F. 2d 319 (2d Cir. 1978).

[8]585 F. 2d 1142 (1st Cir. 1978).

[9]*See* Note 3 and accompanying text, *supra*.

As described more particularly in the following subsections of this Point, the present conflict among the Circuits is neither academic nor unimportant. Instead, because of this conflict the liability of the shipowner is determined by the Circuit in which the action is tried rather than by the facts of the individual case. This result, which vitiates the express wish of Congress[10] that a national standard of care be applied in longshoreman suits, may only be resolved by a decision by this Court.

C) The Third Circuit

The Third Circuit has held that the applicable standard of care is properly based on Section 409 of the Restatement of Torts (Second) and not on Section 343A. *Hurst* v. *Triad Shipping Co.*, 554 F. 2d 1237 (3rd Cir. 1977). Section 409 provides:

> "Except as stated in §§410-429, the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants." Restatement (Second) of Torts §409 (1965) *Hurst, supra* at 1250.

The decision in *Hurst* also held that the exceptions to the Rule of §409, contained in §§410-429 do not apply to longshoreman cases since they incorporate precisely the non-delegable duty which Congress sought to eliminate by the 1972 Amendments. *Hurst, supra* at 1251 referring to H.R. Rep. No. 1441, 92nd Cong. 2d Sess. (1972) *reprinted* in 3 U.S. Code Cong. and Admin. News pp. 4702-04 (1972), *see also* Restatement (second of Torts, Topic 2, Introductory Note at 394 (1965).

Of the remaining exceptions to the general rule of §409 the Court held only one could apply, viz.,

> §414 NEGLIGENCE IN EXERCISING CONTROL RETAINED BY EMPLOYER
>
> "One who entrusts work to an independent contractor, but

[10] *See* Point II, *infra.*

> who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." *Hurst, supra* at 1251. Restatement, (Second) of Torts §414 (1965).

In holding that the control retained by a shipowner over stevedore operations is not the degree of control to which §414 is directed the Third Circuit examined Comment C to §414 which provides:

> "In order for the rule stated in this Section to apply, the employer must have retained at least some control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way."

The standard of care adopted in *Hurst* has been recently reaffirmed. In *Rich* v. *United States Lines, Inc.*, 596 F. 2d 541 (3rd Cir. 1979) the Court examined a factual situation almost identical to that present here.[11]

In applying §414 the Court held that, ". . . the critical evidence needed to impose liability under Section 414 is that of the vessel owners control over the operative detail of the stevedores work." *Rich, supra,* at 550.

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[11] In *Rich, supra,* the plaintiff slipped from an icy container *aboard* the vessel.

In dismissing the argument of the plaintiff that the shipowner may be liable to the plaintiff for failing to act independently of the stevedore the Court stated,

> "[the witness] indicated that the purpose of hiring the stevedore was to bring on board men who are experts in handling containerized cargo (transcript citation omitted). As a result, it is the stevedore and not the vessel owner who is most intimately familiar with the procedures to follow in order to safely load, unload and shift cargo and who is best able to assess the relative dangers its employees will face." *Rich, supra,* at 555.

After finding that since only the stevedore personnel were expected to walk on these containers and thus ice and snow on the same was no more the responsibility of the shipowner than a stevedore created condition, the Court went on to say,

> ". . . to hold [that] the vessel owner had an 'independent obligation' to alleviate this dangerous condition based only on his knowledge would thus impose a 'duty of supervision' on the vessel owner and would 'amount once again to the establishment of a non-delegable duty.' *Hurst* v. *Triad Shipping Co.,* 554 F. 2d at 1251" *Rich, supra,* at 556.

This independent obligation and duty of supervision is exactly what the Second Circuit has imposed on the petitioner in the case *sub judice*. Thus, had the instant case arisen in the Third Circuit, the petitioner would owe no liability to the respondent unless the petitioner was in control of the discharge operations. Since the evidence at trial demonstrates that the procedure and equipment used in this case were chosen by the respondent's employer and operated under the exclusive control of the employer's agents, with knowledge of the allegedly dangerous conditions, the petitioner would owe no duty to the respondent to alleviate these conditions in the Third Circuit. Consequently, the standard of care applied in the Third Circuit is in absolute and direct conflict with the standard of care adopted in the Second Circuit in the instant case.

D) The Fourth Circuit

The decision in the instant petition is also in direct conflict with the standard of care developed in the Fourth Circuit Court of Appeals' decision in *Riddle* v. *Exxon Transportation Co.*, 563 F. 2d 1103 (4th Cir. 1977). In *Riddle* the jury was given instructions almost identical to those denied to the petitioner in this case. These instructions provided that,

> ". . . the primary responsibility for the safety of the plaintiff and the other men engaged in making the repairs on the [vessel] rested upon the shipyard and not the shipowner." *Riddle, supra,* at 1109.

The Fourth Circuit affirmed the use of these instructions citing its earlier decisions[12] and reaffirming the principle that a shipowner is to be viewed as the employer of an independent contractor whose liability to injured longshoreman is consequently to be determined by land-based concepts of negligence, and not the legislatively discarded maritime concepts of non-delegable duty or seaworthiness.

Therefore, the Court held,

> "Applying land-based law, as declared in the Restatement the shipowner owes no duty to the [independent] contractor's employees . . . except in respect of concealed or hidden dangers known to him or which ought to have been known to him."

Thus, in the Fourth Circuit the shipowner has no duty towards a longshoreman for conditions which are "open and comprehensible to any reasonably careful man." *Riddle, supra,* at 1111. In the absence of any duty for open and obvious conditions there cannot be liability therefore.

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[12] *Anuszewski* v. *Dynamic Mariners Corp., Panama,* 540 F. 2d 757 (4th Cir.), *cert. denied* 429 U.S. 1098, 97 S. Ct. 1116, 51 L. Ed. 2d 545 (1977): *Bess* v. *Agromer Line,* 518 F. 2d 738 (4th Cir. 1975).

In adopting this standard the Fourth Circuit specifically examined the rule adopted in the Second Circuit in *Napoli, supra,* but disregarded it. Instead, the Court adopted a standard of care and a jury instruction which is in direct conflict with the standard and instructions adopted in the Second Circuit and applied in the case *sub judice.*

It is notable, however, that in considering the Second Circuit *Napoli* rule the Fourth Circuit also stated, *in dictum,*

> "even under the modern Rule [343A] a vessel is not liable for 'open and obvious' dangerous conditions, whether existing at (sic) time control of the vessel is relinquished by the vessel or arising afterwards with the knowledge of the vessel *if the danger is such that the stevedore or shipyard would be expected to correct the condition in the course of discharging its responsibility for the safety of the longshoreman or shipyard workers."*
> 563 F. 2d at 1111-1112. (Emphasis Added)

This standard was reaffirmed in *Chavis* v. *Finnlines, Ltd. O/Y,* 576 F. 2d 1072 (4th Cir. 1978).[13]

E) The Fifth Circuit

The present standard of care applicable in the Fifth Circuit was initially adopted in *Gay* v. *Ocean Transport & Trading Ltd.,* 546 F. 2d 1233 (5th Cir. 1977) and applied §342, §343 and §343A to suits brought under the amended LHWCA. *Brown* v. *Mitsubishi Shintaku Gingo,* 550 F. 2d 331 (5th Cir. 1977), *Hess* v. *Upper Mississippi Towing Corp.,* 559 F. 2d 1030 (5th Cir. 1977), *Briley* v. *Charente S.S. Co. Ltd.,* 572 F. 2d 498 (5th Cir. 1978) *Samuels* v. *Empressa Lineas Maritimas Argentinas,* 573 F. 2d 884 (5th Cir.), *cert. denied* 443 U.S. 915, 99 S. Ct. 3106, L. Ed. 2d (1979).

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[13] *See also Harris* v. *Reederei,* 596 F. 2d 92 (4th Cir.), *cert. denied* U.S. , 100 S. Ct. 77 (1980).

The subsequent decisions of the Fifth Circuit have, however, refined the application of the Restatement to longshoreman suits and developed the present conflict existing between the Fifth and Second Circuits.

In the Fifth Circuit the shipowner is not liable where the condition which gives rise to an accident is open and obvious and within the stevedore contractor's ability to correct. *Hess* v. *Upper Mississippi Towing Corp.*, 559 F. 2d 1030 (5th Cir. 1977), *Briley* v. *Charente S.S. Co., Ltd.*, 572 F. 2d 498 (5th Cir. 1978).

This standard was most recently reaffirmed in *Roberts* v. *Andrew Martin Sea Services, Inc.* No. 78-2219, Slip Op. 5932 (5th Cir. May 30, 1980) where a longshoreman was injured due to rough weather which caused waves to wash over the area where he was working. The Court held that the weather conditions were open and obvious to the longshoreman's employer upon whom the primary responsibility for the longshoreman's safety rested. Thus, even if the shipowner was aware of the condition, the stevedore contractor remained under a duty to act to protect its employee and its failure to do so was the proximate cause of the plaintiff's injury.

Thus, had the facts of the instant case arisen in the Fifth Circuit, the proximate cause of the respondent's injury would have been determined, as a matter of law, to have been the stevedore contractor's failure to eliminate the allegedly dangerous condition of which it was aware and over which it exercised active control. Since Congress never intended that the liability of a shipowner be determined by the situs of the injury, the conflict among the circuits which caused the differing results referred to above must be resolved by this Court.

F) The Ninth Circuit

As early as 1960 the Ninth Circuit had articulated the specific issue which has created the present conflict among the circuits. In that year the Ninth Circuit decided *Hugev* v. *Damp-*

skisaktieselskabet International,[14] and in doing so affirmed the opinion of the trial judge as correctly deciding the issues concerning the duties owed between shipowner and stevedore.[15]

In an opinion which appears to have anticipated the present conflict, the court described the inherently dangerous conditions a vessel returning from sea would normally present and adopted the following as the standard of care owed by the shipowner to the stevedore employer;

> "(1) to exercise ordinary care under the circumstances to place the ship on which the stevedoring work is to be done, and the equipment and appliances aboard ship, in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to encounter, arising from the hazards of the ship's service or otherwise, will be able by the exercise of ordinary care under the circumstances to load or discharge the cargo, as the case may be, in a workmanlike manner and with reasonable safety to persons and property; and
>
> (2) to give the stevedoring contractor reasonable warning of the existence of any latent or hidden danger which has not been remedied and is not usually encountered or reasonably to be expected by an expert and experienced stevedoring company in the performance of the stevedoring work aboard the ship, if the shipowner actually knows or, in the exercise of ordinary care under the circumstances, should know of the existence of such danger, and the danger is one which the shipowner should reasonably expect a stevedoring contractor to encounter in the performance of the stevedoring contract." *Hugev,* 170 F. Supp. at 610.

The persuasive reasoning of the *Hugev* decision remained the

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[14] 170 F. Supp. 601 (1959), *aff'd. sub. nom., Metropolitan Stevedore Co.* v. *Dampskisaktieselskabet International,* 274 F. 2d 875 (9th Cir.) *cert. denied* 363 U.S. 803 (1960).

[15] Since this case was decided prior to the 1972 Amendments the decision concerned the duties owed between the ship and the stevedore as opposed to the duties owed between the ship and the plaintiff.

standard of care in the Ninth Circuit until the recent decision of *Santos* v. *Scindia Steam Navigation Co.*, 598 F. 2d 480 (9th Cir.) *Cert. Granted,* U.S. (1980). The standard adopted in *Santos* provides as follows:

> "A vessel is subject to liability for injuries to a longshoreman working on or near the vessel caused by conditions on the vessel if but only if, the shipowner
>
> a) knows of or by the exercise of reasonable care would discover the conditions and should realize that it involves an unreasonable risk of harm to such Longshoreman, and
>
> b) the shipowner fails to exercise reasonable care under the circumstances to protect the Longshoreman against the danger." 598 F. 2d at 485.

This standard is not supported by either the legislative history of the Amendments[16] or the vast body of Post Amendment decisions which have properly recognized the right of a shipowner to delegate active control of the vessel to the independent contractor.

In determining whether *Hugev, supra* or *Santos, supra* represents the prevailing standard of care in the Ninth Circuit it must be noted that the *Santos* decision, which adopted a standard of care in full recognition of its conflict with the Second, Fourth and Fifth Circuits,[17] will soon be reviewed by this Court.[18]

The standards of care adopted by the First, Third, Fourth, Fifth and Ninth Circuit Courts of Appeals are in direct conflict with each other and with the instant Second Circuit case. The uniformity intended by Congress can only be effectuated by a resolution of this conflict by this Court.

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[16] *See* Point II, *infra.*

[17] *Santos, supra,* at 486-487, *see also Bachtel* v. *Mammouth Bulk Carriers,* 605 F. 2d 438 (9th Cir. 1979) petition for certiorari filed October 1, 1979.

[18] *Santos, supra, cert. granted* _____ U.S. _____ (1980).

POINT II

Congress intended that negligence under the LHWCA be uniformly defined as a matter of federal law.

The importance of resolving the conflicting decisions of the Circuit Courts of Appeals referred to in Point I, *supra*, is reflected in the report of the House Committee on Education and Labor concerning the 1972 Amendments to LHWCA.[19]

That Congress intended a uniform definition of "negligence" is evident;

> ". . . the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal Law."[20]

Similarly, this Court has stated,

> ". . . Federal admiralty law should be a 'system of law coextensive with and operating uniformly in the whole country' the Lottawanna, 21 Wall 558, 575, 22 L. Ed. 654, 662 (1875)" *Morange v. States Marine Lines*, 398 U.S. 375, 357 (1970).

In endeavoring to comply with this intention the various Circuit Courts have adopted various sections of the Restatement of Torts, (Second), derivations thereof, or have developed an independent standard of care. It remains, however, for this Court to determine which standard properly effectuates the announced

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[19]S. Rep. 92-1125, 92nd Cong. 2d Sess. 12; H.R. Rep. No. 92-1447, 92nd Cong. 2d Sess., *reprinted in* [1972] U.S. Code Cong. and Admin. News 4698.

[20]H.R. Rep., *supra*, note 19 at 4705.

intent of Congress to develop a uniform federal definition of the term "negligence" in the amended LHWCA.

The respective sections of the Restatement and specifically §343A[21] are too narrowly drawn to adequately fulfill this objective. Rather what is required is a national standard of care developed by this Court in light of the purpose of the 1972 Amendments.

POINT III

Section 343A of the Restatement (Second) of Torts does not properly apply to this case.

Section 343A is inapplicable to the facts and circumstances of the case *sub judice* for two reasons. First, Section 343A does not reflect the Congressional intent in amending LHWCA in 1972, and second, assuming *arguendo* that §343A does apply to a longshoreman suit, it is inapplicable where the injury does not occur on the vessel. These points are discussed seriatim.

A) Section 343A is inapplicable to the purpose of LHWCA as amended in 1972.

In amending the LHWCA in 1972 the Congress intended to,

> "place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore."[22]

Specifically, the Committee stated,

> "The Committee intends that the vessel shall not be liable . . . failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances."[23]

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[21] *See* Point III, *infra*.
[22] H.R. Report, *supra*, note 19 at 4704.
[23] H.R. Rep., *supra*, note 19 at 4704.

The *quid pro quo* for these changes was the establishment of an adequate compensation plan with the burden of providing for the safety of the longshoreman economically placed upon the stevedore employer. The purpose of placing the burden on the stevedore employer was to ". . . strengthen the employers incentive to provide the fullest measure of on the job safety"[24] while the legal effect intended was to assure

> "that a vessel shall not be liable . . . for the manner or method in which stevedores or employees of stevedores . . . perform their work, Ang. Stevedores v. Ellerman Lines, 369 U.S. 355, Blassingill v. Waterman S.S. Corp. 336 F. 2d 367,"[25] [or] for gear or equipment of stevedores . . . whether used aboard ship or ashore . . ."[26]

Section 343A of the Restatement of Torts (Second) does not effectuate these announced policies. While §343A may demonstrate the land-based common law of duties of a landowner to an invitee, it does not represent the land-based common law of the duties of a land-owner to the employee of an independent contractor employed by the land-owner. Instead, Section 409, adopted in the Third Circuit[27] provides the Common Law applicable to the land-based situation most analogous to the *shipowner-stevedore* situation presented in the typical longshoreman suit. Section 409, as opposed to §343A takes into account the expertise of the independent stevedore in performing longshoring operations. More importantly, Section 409 provides for the proper legal effect the shipowners renunciation of control over the longshoring operations to the professional stevedore should have whereas Section 343A does not. Section 343A assumes the continued control over the land by the landowner and thus imposes a continuing duty on the landowner to protect invitees from dangerous conditions on the land where the landowner reasonably anticipates the invitee will not be able to avoid

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[24] Ibid. at 4699.
[25] Ibid. at 4703.
[26] Ibid. at 4703.
[27] *See* notes 11 and accompanying text, *supra.*

the harm. This continued control to which §343A is directed is not maintained by a shipowner when longshoring operations commence. Rather, the shipowner employs the stevedore as a professional independent contractor for the express purpose of loading or unloading the shipowners vessel. In doing so, the shipowner relinquishes control of the stevedores work area and delegates to that independent contractor the exclusive control and supervision of the longshoring operations. This delegation of control is precisely the situation envisioned by Congress in amending LHWCA. To impose §343A which vitiates any legal effect of this delegation of control is to forbid to the shipowner that which Congress specifically permitted, viz,

> "The purpose of the amendments is . . . not to endow [the longshoreman] with any special maritime theory of liability or cause of action . . . such as unseaworthiness [or] non-delegable duty."[28]

Section 343A, however, as interpreted by various decisions of the Second Circuit,[29] effectively imposes on the shipowner an "independent obligation"[30] to the operation of the stevedore employer and thus reduces the shipowners delegation of control to a legal nullity. Those decisions of the Second Circuit which recognize the Congressionally intended right of a shipowner to delegate control to the stevedore employer and rely on the expertise of the stevedore in performing its duties are more properly derived from §409 and not §343A.[31]

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[28] H.R., *supra*, note 19.

[29] *i.e. Napoli* v. *Hellenic Lines Inc.*, 536 F. 2d 505 (2nd Cir. 1976); *Lubrano* v. *Royal Netherlands Steamship Corp.*, 572 F. 2d 364 (2d Cir. 1978); *Lopez* v. *A/S D/S Svendborg*, 581 F. 2d 319 (2d Cir. 1978); *Cannizzo* v. *Farrell Lines, Inc.*, 579 F. 2d 682 (2d Cir. 1978).

[30] *Rich* v. *United States Lines Inc.* 596 F. 2d 541 (3rd Cir. 1979).

[31] *Munoz* v. *Flota Merchante Grancolombiana* 553 F. 2d 837 (2nd Cir. 1977) *Cox.* v. *Flota Merchante Grancolombiana*, 557 F. 2d 798 (2d Cir. 1978); *Giglio* v. *Farrell Lines Inc.*, 613 F. 2d 429 (2d Cir. 1980); *Mattivi* v. *South African Marine Corp., Inc.*, 618 F. 2d 163 (2d Cir. 1980); *Lubrano* v. *Royal Netherlands Steamship Co.*, No. 79-7228, Slip op. 2163 (2d Cir., March 31, 1980).

Since Section 343A of the Restatement (Second) of Torts, does not reflect the intention of Congress in amending the LHWCA to impose liability on a shipowner only for the shipowners failure to exercise ordinary care it was error for the Second Circuit to have applied it to the facts and circumstances of this case.

B) Section 343A cannot properly apply to an injury which did not occur on the vessel.

Section 343A applies to, ". . . any activity or condition *on the land* . . ."[32]

As referred to above, this Section assumes the landowner controls the activities or conditions on the land or by the exercise of ordinary care could control said activities or conditions.

The pier, however, is in the absolute and exclusive control of the stevedore employer and the issue of permissible delegation of control or its effect cannot properly apply to an injury where the stevedores control is initially exclusive and absolute.

Instead, the facts of this case demonstrate the allegedly dangerous condition was not created by the shipowner-defendant nor did the injury occur on the vessel. The plaintiff's injury occurred on a pier, due to a condition over which the petitioner had no control. Furthermore, although the allegedly dangerous conditions were admittedly known to the respondent's immediate supervisors, neither of them complained to the petitioner that the condition was dangerous and neither of these supervisors requested that work be interrupted or the condition alleviated. In fact, the testimony at the trial showed that icy ~~conditions~~ containers had been removed from the ship earlier that day and that it was customary for containers to become icy at that time of year. Both the plaintiff and his supervisors were aware of these conditions and the means by which the conditions could be alleviated if they were considered dangerous. The stevedore super-

[32] Restatement (Second) of Torts §343A, (emphasis added).

visors, however, chose to ignore CFR §1918.91(c) which requires the stevedore to eliminate slippery conditions as they occur and continued the work without interruption. The petitioner took no part in this decision and was not informed by the stevedore employer nor could it reasonably assume from the stevedore employer that this decision would place the stevedore employees in a position of harm they could not reasonably be expected to avoid. To impose liability on a shipowner for injuries allegedly arising from a condition which the shipowner did not cause and could not control is to ignore the purpose of the 1972 Amendments to the Longshoremen's and Harbor Workers' Act and return to the Congressionally discarded theory of unseaworthiness in a longshoreman's suit.

Consequently, it was error for the Second Circuit Court of Appeals of affirm the decision of the United States District Court for the Southern District of New York which applied §343A to the facts of this case to deny petitioner's motion for summary judgment *non obstante verdicto.*

CONCLUSION

Since Congress amended the Longshoremen's and Harbor Workers' Compensation Act in 1972 to eliminate the doctrine of unseaworthiness and limit a shipowner's liability to longshoremen to only those injuries resulting from the shipowner's negligence, the Courts of Appeals and the District Court have endeavored to formulate a standard of care by which this negligence could be measured and the purpose of the amendment implemented.

The conflicting decisions which have arisen from these endeavors now present an important question of federal law, which has not been, but should be decided by this Court. The traditional rule, and the specific intent of Congress, is that uniformity be sought in federal admiralty law. Only a definitive decision by this Court will properly insure that this tradition be effectuated.

For the foregoing reasons counsel for the petitioner submit that this Court should grant a Writ of Certiorari to review the decision of the Second Circuit Court of Appeals and consolidate this case with any other cases in which petitions for writs of certiorari are filed raising the same standard of care issue.

Respectfully submitted,

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Of Counsel

APPENDIX A—Opinion of the District Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAM IRIZARRY, *Plaintiff,* *against* COMPANIA MARITIME NAVEGACION NETUMAR, S.A., *Defendant.*	79 Civ. 540 (RJW)

Defendant moves pursuant to Rules 50(b) and 59, Fed. R. Civ. P., for an order granting judgment notwithstanding the verdict and for a new trial and to reduce the jury verdict of $40,500 as excessive. For the reasons hereinafter stated, the motion is denied.

In a complaint filed on January 31, 1979, plaintiff sought damages for injuries allegedly sustained on February 1, 1977 while he was working as a longshoreman. Plaintiff claimed that he slipped and fell approximately eight feet from the ice-covered top of a container which had just been unloaded from defendant's vessel, the M/V Diana, and that he sustained a laceration near his left eye and injured his right shoulder, wrist, ankle and back. He incurred medical expenses of $1,545 and lost 18 weeks from work resulting in lost wages of $7,200. After trial, the jury found plaintiff had sustained damages of $45,000, reduced the damages by 10% due to plaintiff's contributory fault and, as noted above, awarded him $40,500.

Defendant contends that it was surprised at trial when plaintiff called a witness not identified in his deposition, in his answers to interrogatories, or in the pre-trial order. The witness

was Nicholas Esposito, a fellow longshoreman. Esposito's testimony was important since it established the requisite notice to the vessel's first mate of the ice on the top of the container. Plaintiff's counsel contends that he did not discover the witness until shortly before the trial, at which time he notified defendant's counsel of his intention to call him.

At a conference with the Court prior to trial, counsel for defendant objected to plaintiff's calling Esposito. It appeared that in the event Esposito was precluded from testifying, a dismissal for lack of notice was virtually certain. Faced with this likelihood, the Court indicated that it would permit Esposito to testify, subject to permitting defendant's counsel either to defer his cross-examination or to request a continuance to allow defendant to meet Esposito's testimony. At trial, defendant chose to proceed immediately to cross-examine the witness and did not request a continuance either at that time or prior to resting.

It is defendant's contention that a "manifest injustice" was done by allowing Esposito to testify, that defendant was "surprise" and that the result was a large and unexpected verdict. Defendant urges that "to prevent manifest injustice," the judgment should be vacated and a new trial granted. Defendant also contends that although there were medical expenses of $1,545 and lost wages of $7,200, the verdict was excessive and should be set aside or at least reduced.

The first issue presented by defendant's contentions is whether the Court abused its discretion in permitting Esposito to testify. The Court recognized that, on the one hand, if Esposito was not permitted to testify, a dismissal based on lack of notice would undoubtedly have followed. On the other hand, permitting him to testify without his having been identified earlier deprived defendant of the opportunity to take his deposition before trial and to check or rebut his story. Faced with this choice, the Court permitted Exposito to testify and have defendant's counsel the aforementioned options. Defendant, however, exercised neither of these options. Having chosen not to defer his cross-examina-

tion of the witness or to request a continuance, defendant cannot now have a second bite at the apple by obtaining a new trial.

One of the principal objectives of the pre-trial order required by Rule 16, Fed. R. Civ. P., is to keep the use of surprise tactics to a minimum. Yet it is without question, and Rule 16 so provides, that a district court may in its discretion modify a pretrial order at trial if justice requires. *Clark* v. *Pennsylvania R. Co.*, 328 F. 2d 591, 594 (2d Cir. 1964). Indeed, even where, unlike here, a party acting in bad faith "springs a surprise witness on his adversary in defiance of the terms of a pre-trial order," a district court may still permit the witness to testify and grant the opposing party a continuance. *Id.* at 594-595. In this case, defendant chose not to avail itself of the opportunity for a continuance offered by the Court.

The second issue raised by defendant is whether the verdict is excessive and should be set aside or reduced. On the basis of the evidence introduced at trial, including the testimony of plaintiff and his physician, a jury could reasonably have concluded that plaintiff sustained a permanent injury to his right shoulder that will, in the future, prevent him from performing strenuous tasks in the court of any employment involving lifting. In light of the evidence that plaintiff experienced extreme discomfort following his injury and continues to experience pain in his right arm when he lifts things, it cannot be said that the jury's award of $40,500 was grossly excessive, particularly when it is discounted over the remainder of this 35-year-old plaintiff's expected life span. *See Dagnello* v. *Long Island R.R. Co.*, 289 F. 2d 797, 806 (2d Cir. 1961). Accordingly, defendant's motion is in all respects denied.

It is so ordered.

Dated: New York, New York
November 9, 1979

ROBERT J. WARD
U.S.D.J.

APPENDIX B—Opinion and Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of April, one thousand nine hundred and eighty.

Present: HON. IRVING R. KAUFMAN,
Chief Judge

HON. JAMES L. OAKES,
Circuit Judge

HON. HUBERT L. WILL,
District Judge sitting by designation

79-7876

SAM IRIZARRY,
Plaintiff-Appellee,

COMPANIA MARITIME NAVEGACION NETUMAR, S.A.
Defendant-Appellant.

Docketed as
a Judgment #80-0616
on 5/22/80

Appendix B—Opinion and Judgment of the Court of Appeals.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. In this suit by a longshoreman employed by an independent stevedore, Sealand Terminals, against the owner of the vessel, the M.V. Diana, appellee claimed to be injured when he fell from a container that had just been unloaded from the vessel. There was evidence at trial from which the jury could have concluded that appellee's job required him to walk across the top of the container to detach the cables by which it had been hoisted from the vessel's hold, that he slipped due to ice and slush on the top of the container that had accumulated before the ship reached port, and that the vessel had actual notice of this condition.

2. Under the Longshoremen's and Harbor Workers' Act, 33 U.S.C. §905(b), a shipowner is not liable to a longshoreman for physical harm caused by any condition whose danger is known or obvious to the longshoreman, unless the shipowner should anticipate the harm despite such knowledge or obviousness. Restatement (Second) of Torts §343A; *Napoli* v. *Hellenic Lines, Ltd.*, 536 F. 2d 505 (2d Cir. 1976). Both notice to the shipowner and the necessity for Irizarry to walk across the container are established by the evidence. Moreover, this case is not controlled by *Lubrano* v. *Royal Netherlands Steamship Co.*, 572 F. 2d 364 (2d Cir. 1978) where unsafe conditions were caused by and under the control of the stevedore and longshoremen, rather than the shipowner. As a majority of the panel in

Giglio v. *Farrell Lines, Inc.*, 613 F. 2d 429 (2d Cir. 1980) recognized, 29 C.F.R. 1918.91(c) ("Slippery conditions shall be eliminated as they occur.") does not relieve the vessel "from responsibilities or duties now placed upon them by law, regulation or custom." 29 C.F.R. §1918.2(b). Moreover, the Joint Maritime Safety Code, Part C, §1 provides, "The owner, master and officers of the vessel shall supply and maintain in safe condition for use all ship's gear, equipment, tools and work spaces which are to be used in stevedoring operations."

3. The appellant's final claim of error is that the district court erred in amending its pretrial order to permit a key witness, Nicholas Esposito, to testify, despite lack of prior notice to the shipowner. In light of the fact that the trial court found that the omission of Esposito's name was not in bad faith, and further offered to grant appellant a continuance to mitigate any resulting prejudice, we cannot say that the district court's decision to amend its order and permit Esposito to testify constituted an abuse of discretion. *Clark* v. *Pennsylvania Railroad Co.*, 328 F. 2d 591 (2d Cir. 1964).

IRVING R. KAUFMAN,
Chief Judge.
JAMES L. OAKES,
Circuit Judge
HUBERT L. WILL,
District Judge

JUDGMENT ENTERED
A true copy,
A. DANIEL FUSARO
Clerk